

## MEMORANDUM

**TO:** Members of P.L. 86-272 Work Group  
**FROM:** Brian Hamer  
**RE:** Summary of June 20, 2019 teleconference  
**DATE:** July 5, 2019

This is a high-level summary of the June 20 meeting (via teleconference) of the P.L. 86-272 Work Group. It is not intended to serve as minutes of the meeting but rather to highlight key matters that were addressed, in order to facilitate discussion at future meetings of the Work Group.

The meeting began with Chair Laurie McElhatton noting that the Work Group has discussed during recent meetings various theories regarding the application of P.L. 86-272, and it is clear that all members have not reached a consensus on the best theory. She proposed that the Work Group return to the scenarios and take some immediate straw votes. She stated that votes might help members agree on a theory later in the process. She noted that the Work Group does not necessarily have to set forth a theory in the revised MTC Statement; it could just propose some additional items to the list of unprotected activities. When voting on whether or not activities are protected by the statute, participants can base their votes on what they believe is the most compelling theory, or on a practical assessment of what makes sense for the MTC to opine on.

Joe Huddleston asked for clarification on whether the Work Group is addressing pre-sale or post-sale activities. Ms. McElhatton explained that the various scenarios discussed to date have addressed post-sale customer support.

The Work Group thereupon reconsidered prior scenarios beginning with Scenario 2B. [Link to the full list of scenarios appears on the Work Group project page on the MTC website, including assumptions that are not repeated here.]

2. Seller maintains a website offering for sale only items of tangible personal property. The products are complicated to use and purchasers often need post-sale assistance. Seller provides assistance in only one of the following ways:

2B. Purchasers may either email or engage in electronic chat sessions with a customer assistance representative through the seller's website.

The Work Group took three votes. The totals were as follows:

--using email accessed through a link on the seller's website

Protected      2 votes  
Unprotected   10 votes

--using ordinary email not accessed through a link

Protected 9 votes  
Unprotected 3 votes

--using electronic chat accessed through the seller's website.

Protected 0 votes  
Unprotected 12 votes

2C. Seller posts on its website a list of frequently asked questions together with answers.

Michael Fatale stated that this activity is protected because there is no interaction; it is reminiscent of the early Internet. He also mentioned the danger of bringing in small unsophisticated vendors. Ray Langenberg stated that this activity is unprotected but de minimis because the communication is not directed towards any particular state. Bruce Johnson stated although the two speakers reached the same practical result, the different means they used to reach that result should be disclosed. Another participant noted that posting static FAQs is analogous to providing a written instruction manual.

The vote was as follows:

Protected 6 votes  
Unprotected but de minimis 3 votes  
Unprotected 0 votes

2D. Seller's website includes an interactive tool which allows customers to type in a question. In response, the system (without human intervention) either asks follow-up questions or provides an answer.

Applying his approach, Ray Langenberg expressed that this activity is unprotected but could be de minimis depending on the circumstances since the seller may not know where the customer is located. Michael Fatale suggested that sellers would know the location of the customer. Phil Horowitz stated that something is clearly happening in the state but whether that is the type of business activity required by the statute is another question; in his opinion *Wayfair* does not answer that question. No purposeful direction here; there is more to "activity" under the statute than economic nexus.

The vote was as follows:

Unprotected 12 votes (note that Ray Langenberg expressed that the activity is possibly de minimis)

2E. Seller's website includes seller-sponsored "how to" videos and in some cases similar videos posted by its customers.

One participant asserted that this is the "epitome" of an in-state service, but another participant questioned whether this was different from typing the transcript of the video, taking a photo of that transcript and placing the photo on an FAQ page. The earlier participant noted that FAQs are static whereas videos are not static. Another participant did not see the video as different from the FAQs. Ray Langenberg again made the point that the activity is not purposefully directed to the state if the seller does not know who is looking at the video; therefore, the activity in his view is de minimis. Another participant asked how the state would know if people are watching the video before or after making a

purchase; some customers may watch the video before making a purchase to see how the item works or to determine if they want to make the purchase.

The vote was as follows:

Protected 5 votes  
Unprotected but de minimis 1 vote  
Unprotected 6 votes

3. Seller maintains a website offering for sale only items of tangible personal property. The products are covered by a warranty. If a product ceases to function properly during the warranty period:

3A. Seller is able to fix the product remotely via the internet and WIFI (e.g., fixing a remote-control device that controls a bed's position).

One participant made the point that we are looking at these various facts in a vacuum. Remote sellers typically use many of these tools. Once a seller offers a chat function, for example, it won't matter which other tools are being used.

The vote was as follows:

Protected 0 votes  
Unprotected 12 votes

3B. Purchaser may mail the product to the seller for repair after downloading a return slip from the website.

One participant expressed that this is a significant activity being performed through the website. Some other participants stated that there is not much interaction.

The vote was as follows:

Protected 5 votes  
Unprotected 7 votes

4. Seller maintains a website offering for sale only items of tangible personal property. The website invites viewers to apply for employment at the seller.

4A. The website allows applicants to upload a copy of their cover letter and resume, which is then reviewed by seller's HR team (which is not located in state). The HR team then sends an email to applicants either informing them that they will not be hired or inviting them to participate in a telephone interview.

One participant stated that this was in-state activity performed through the seller's website. Another participant stated that this is a very interactive activity in the state. But another participant stated that no one is in the state and the job is not located in the state.

The vote was as follows:

Protected 1 vote  
Unprotected but likely de minimis 1 vote  
Unprotected 10 votes

4B. The website directs applicants to complete an online form which is evaluated and scored by an automated system based on the appearance of certain words or phrases. Applicants who receive a high score are invited to participate in a telephone interview.

In response to a question from the Chair, no one indicated that they would vote differently on scenario 4B than on scenario 4A.